STATE OF MICHIGAN

IN THE SUPREME COURT

* *

LOUIS GHAFFARI,

Plaintiff / Appellant,

v

TURNER CONSTRUCTION COMPANY, a Michigan corporation, HOYT, BRUM & LINK, a Michigan corporation, and GUIDELINE MECHANICAL, INC., a Michigan corporation,

Defendants / Appellees.

Supreme Court Nos.124786, 124787
C/O/A Docket Nos. 241532, 240025
L/C Civil Action No. 00-07319-NO

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA GREATER DETROIT CHAPTER INC. and MICHIGAN CHAPTER ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.'S MOTION FOR LEAVE TO FILE BRIEF AND PARTICIPATE AS AMICUS CURIAE

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IDENTIFICATION OF ORDER APPEALED FROM

The Associated General Contractors of Greater Detroit and the Michigan Chapter of The Associated General Contractors of America (Collectively, AGC) submit this brief in response to the invitation of the Michigan Supreme Court, by its order dated November 5, 2004, reported at ***Ghaffari v Turner Construction,*** **471 Mich. 915; 688 N.W.2d 511; 2004.**

STATEMENT OF QUESTIONS INVOLVED

On November 4, 2004, this Court entered an Order requesting the parties to brief two particular questions, and inviting other interested persons or organizations to file amicus briefs. The questions are:

I. SHOULD THE OPEN AND OBVIOUS DOCTRINE HAVE ANY APPLICATION IN A CLAIM UNDER THE COMMON WORK AREA DOCTRINE DESCRIBED IN ***ORMSBY V CAPITAL WELDING, INC.*, 471 MICH 45, 54 (2004)**?

Trial Court said "YES"

Court of Appeals said "YES"

Defendant Turner Construction says "YES"

Amicus Curiae AGC says "YES"

Plaintiff says "NO"

II. IF SO, HOW SHOULD THE OPEN AND OBVIOUS DOCTRINE BE RECONCILED WITH HARDY v MONSANTO-CHEM SYSTEMS, INC, 414 MICH 29 (1992), IN WHICH THIS COURT CONCLUDED THAT THE POLICY OF PROMOTING SAFETY IN THE WORKPLACE WOULD BE ENHANCED BY THE APPLICATION OF PRINCIPLES OF COMPARATIVE NEGLIGENCE?

The AGC says that the open and obvious doctrine is not inconsistent with, and in fact squares with the "unitary approach" outlined by the ***Hardy*** court: "As discussed above, the application of comparative negligence to *all* workplace negligence satisfies ***Funk*** policies as well as encourages safer behavior by both contractors and workers. We prefer a unitary approach under which both the plaintiff and defendant are charged with the duty act reasonably under all the circumstances." ***Hardy* at 47 (emphasis in original).**

STATEMENT OF INTEREST OF AMICUS CURIAE AGC

The Associated General Contractors of America (AGC) represents over 7,200 firms, organized into over 100 local Chapters throughout the 50 states and Puerto Rico. The AGC, and its affiliate chapters, is recognized as the authority in construction-related matters. The AGC is the nation's largest and oldest construction trade association, established in 1918 after a request by President Woodrow Wilson. Wilson recognized the construction industry's national importance and desired a partner with which the government could discuss and plan for the advancement of the nation. AGC has been fulfilling that mission through a variety of means for the last 85 years.

The AGC of Greater Detroit's origins actually pre-date the establishment of the national AGC organization by two years. The core of what is now AGC Greater Detroit has been serving the Southeastern Michigan area since 1916 and currently serves over 180 member companies. The Michigan Chapter AGC was established in 1927 and currently serves over 200 member companies.

The AGC, as the voice of the construction industry, operating in partnership with the national organization, provides a full range of services satisfying the needs and concerns of its members, thereby improving the quality of construction and protecting the public interest. It is dedicated to improving the construction industry daily by educating the industry to employ the finest skills, promoting use of the latest technology and advocating building the best quality projects for owners--public and private. The AGC is committed to three tenets of industry advancement and opportunity: ***Skill, Integrity, and Responsibility***.

On November 4, 2004, this Court entered an Order asking the parties to submit briefs addressing two particular issues, and inviting other interested persons or organizations to file briefs amicus curiae. ***Ghaffari v Turner Construction Co, et al*, 2004 Mich LEXIS 2246; 688 NW2d 511 (2004)**. The Michigan Chapter AGC and AGC Greater Detroit Chapter both participated as Amicus Curiae in ***Ormsby v Capital Welding, Inc.*, 471 Mich 45; 684 NW2d 320 (2004)**, which clarified the common work area doctrine. Since the present case requires the Court to consider the interplay between the common work area doctrine and the open and obvious doctrine, the AGC once again considers this an important case. The AGC believes that its Amicus Curiae Brief will assist the Court in deciding these issues, which have a direct impact on the general contracting community in Michigan.

OVERVIEW OF AMICUS CURIAE AGC'S POSITION

This Amicus Brief addresses the concerns of General Contractors (GC's). This brief is intended to focus narrowly on the two questions posed by the Supreme Court. Within those questions, the AGC further has narrowed its focus to concentrate on the elements of the "common work area" doctrine that appear to present a conflict with the "open and obvious" doctrine. The AGC argues that the perception promoted by the Plaintiff in this case, that the doctrines are mutually incompatible, is without merit.

The AGC supports the policy expressed by the Court in ***Hardy v Monsanto***:

> "[T]he application of comparative negligence to *all* workplace negligence satisfies the *Funk* policies as well as encourages safer behavior by both contractors and workers. We prefer a unitary approach [fn omitted] under which both the plaintiff and defendant are charged with the duty to act reasonably under all the circumstances." ***Hardy v Monsanto,* 414 Mich. 29, 47 (1992) (emphasis in original)**.

The AGC believes the application of comparative negligence principles in the construction context, pursuant to ***Hardy***, will be promoted by the introduction of the "open and obvious" doctrine to work site claims against General Contractors. However, the application of the "open and obvious" doctrine should not replace or diminish the application of the "common work area" test, in which all four elements must be met before a suit may proceed against a GC. The AGC argues that the ***Hardy*** Court's opinion dictates this very result.

Although the "common work area" doctrine addresses the scope of a General Contractor's duty in tort arising from its contractual relationships, and the "open and obvious" doctrine arises from premises liability, the two doctrines are not incompatible or contradictory. The principles of comparative negligence and the policy of promoting job

site safety are vindicated by both doctrines. However, the principles involved are not identical, and as will be explained below, the AGC cautions against superficially blending the two doctrines. The doctrines should be applied separately because each doctrine addresses a distinct aspect of job site responsibility.

BACKGROUND: GENERAL CONTRACTORS AND SUBCONTRACTORS

GC's are different than subcontractors, and the Court should not lose sight of the difference in pursuing its analysis in this case. The relevant difference here turns on the issue of control. Immediate control of safety precautions is normally not in the hands of the GC, but in the hands of the injured worker's employer or of other trades, working in the vicinity. It should also be clear that the "common work area" inquiry is only applicable to a GC, or an owner that retains control so as to step into the shoes of a GC. The "common work area" doctrine is not implicated in connection with an injured worker's claim of negligence against a subcontractor ***(See Funk v General Motors Corp*, 392 Mich 91, 104, n6; 220 NW2d 641 (1974)**, because the subcontractor is directly responsible to exercise appropriate safety measures in the course of its work.

In general contracting, independent subcontractors are engaged to perform specific portions of the construction project. All the subcontractors on a project follow a common set of plans and specifications, but each subcontractor employs their own means and methods to perform their portion of the work.

Subcontractors are engaged by General Contractors because they have expertise in specific areas of construction, such as concrete, steel erection, plumbing, HVAC, electrical, carpentry, controls and other building components. Subcontractors also employ workers who have learned special skills either on the job, or through apprenticeship training schools, which are run by the trade unions.

Subcontractors base their bid for a project on their own work plan to implement the project plans and specifications. Subcontractors are entitled to develop and employ

means and methods that increase efficiency and quality, which ultimately affects its ability to compete in the market. GC's require the subcontractor to adhere to the requirements prescribed by the plans and specifications, but the GC does not dictate the specific means and methods, for it if did, the subcontractor would be robbed of the freedom to advance innovation, and to maximize its own profits thereby.

The hallmark of the subcontract relationship is the *absence* of "control." ***See Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992)** (explaining that an independent contractor is "one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished.") AGC emphasized this issue last year in the Amicus Brief filed in the ***Ormsby*** case.

Even when projects are built using a construction manager (CM), the analysis is the same. Under a CM method of construction, which has become a very common delivery method for construction services, especially in school construction, the Owner retains a CM to oversee the construction, and coordinate scheduling, but the Owner contracts directly with the trade and specialty contractors for performance of the work. The work is bid, and contracts are awarded on the basis of "Bid Packages," which are broken down by specialty, such as concrete, masonry, structural steel, rough and finish carpentry, roofing, mechanical and electrical.

The CM oversees construction on behalf of the Owner, but exercises no more control than a general contractor. The trade contractors perform their specific sub-portions of the work, and retain the right to control the means and methods of their performance.

Thus, the nature of a general contractor's "supervisory and coordinating authority" is limited by the nature of construction contracting, where subcontracting major portions of the work to independent trade and speciality contractors is commonplace. Control over how the work will be performed remains in the hands of an independent contractor.

Commonly, the contract with the Owner requires the GC or CM to be responsible for reviewing overall job site safety, but specifically excludes liability for subcontractors' failure to follow safety rules. Typical subcontracts, as in the instant case, require the subcontractor to be fully responsible for the safety of its workers and for damages it causes to others. Subcontracts usually require adherence to all OSHA and MIOSHA regulations. As this Court has previously ruled, a tort duty is imposed upon a general contractor to *intervene* with subcontractors, and to direct the application of adequate safety measures, only when the Plaintiff can show circumstances which meet each element of the ***Funk-Ormsby*** "common work area" test.

DISCUSSION OF ISSUE I.

SHOULD THE OPEN AND OBVIOUS DOCTRINE HAVE ANY APPLICATION IN A CLAIM UNDER THE COMMON WORK AREA DOCTRINE DESCRIBED IN *ORMBSY V CAPITAL WELDING, INC.*, 471 MICH. 45, 54; 684 N.W.2D 320 (2004)?

The "Common Work Area" Doctrine

The "common work area" doctrine was first articulated in ***Funk v General Motors*** and was an exception to the common law rule that property owners and general contractors were not liable for the negligence of independent subcontractors and their employees. ***Ormbsy v. Capital Welding, Inc.*, 471 MICH. 45, 48; 684 N.W.2D 320 (2004)** . The immediate employer of a construction worker in Michigan has historically been, and remains, immediately responsible for job safety regarding its activities. ***Funk at 102***. Even assuming GC contractual responsibility for review of overall job site safety, the GC is not, and has never been, considered a guarantor of each worker's safety. Michigan Courts have consistently rejected attempts to impose strict liability upon a GC for job-site injuries.

The GC is *not* in the best position to know of its subcontractors' immediate activities. Obviously, the subcontractors themselves are in the best position to know which means and what methods they are themselves employing, whether a particular safety measures is appropriate, and to use that knowledge to protect their own workers. ***Funk*** addressed the question of whether there are any circumstances which require an exception to the general rule of GC non-liability for job-site injuries resulting from the actions of independent subcontractors. To be clear, ***Funk***, like the instant case and like other cases dealing with the "common work area" doctrine, addressed a claim that the GC failed to exert its

authority to alter the behavior of others, when it allegedly could have done so. The type of claim at issue in a ***Funk*** case does not include active negligence on the part of the GC, in which the GC creates a danger, but rather, the claim arises where the GC has not reacted adequately to remediate a danger created *by others*. The distinction is critical to the understanding of the current issue before the Court.

The facts of ***Funk*** presented particularly disturbing circumstances which well illustrate the point: Mr. Funk was a pipefitter employed by a subcontractor at a General Motors plant project. The work involved hanging six-inch pipe from the steel beams of the superstructure of a clear-span addition, 30 feet above the ground. Mr. Funk was an experienced pipefitter, but his only previous experience was in residential construction. Despite Mr. Funk's lack of experience in an industrial setting, his immediate employer provided Mr. Funk no safety equipment and no safety indoctrination. Apparently Mr. Funk raised some concerns about the danger, but his foreman told him, "If you don't want to work up in the steel, go home." Mr. Funk proceeded to attempt to perform the work, assisted only by an apprentice. Mr. Funk was injured when he fell through an opening in the roof, while performing his work.

The ***Funk*** Court found that the GC was fully knowledgeable that its subcontractors (including but *not limited* to Mr. Funk's employer) were *consistently* ignoring safety requirements for men working on the steel beams of the superstructure. The risk of severe injury to the workers was significant. There was no material issue in dispute that the subcontractors' failure to provide safety equipment was not merely an "occasional lapse" but represented a "continual danger" of which the GC had "actual knowledge". ***Funk at***

103. The Court found that the foregoing condition "...was obvious to even the most casual observer." ***Funk at 103***. The Court also quoted testimony by the owner's representative that appeared to reflect a callousness on the part of the owner regarding the risk of injury to the workers, and found the owner and GC's lack of enforcement "legitimized" the subcontractor's ongoing breach of the safety requirements.

> "The question now presented is whether, in the circumstances of this case, the immediate employer having conspicuously failed to provide any safety equipment, this general contractor ***, fully knowledgeable of the employer's dereliction, had the responsibility either to require the employer to implement a meaningful safety program or to themselves supply the obviously necessary safety equipment." ***Funk at 102***.

The Court famously held that, "We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." ***Funk at 104.*** The foregoing statement has been fashioned into a four-part test. What should not be lost in translation is that the test specifically determines if the circumstances are such to create in the GC a duty to remedy a dereliction of duty *by its subcontractor.*

The elements that make up the test are carefully chosen, and the purpose of each element is evident from the Court's discussion of the specific facts in ***Funk***. Those who suggest the "readily observable" element of the ***Funk*** test is identical to an "open and obvious" condition ignore the purpose of the ***Funk*** inquiry. The requirement that the danger be "readily observable and avoidable" stems from the requirement that the GC

have either actual or constructive knowledge of the ongoing dereliction of duty by its subcontractor.[1]

Funk recognizes a GC is not and cannot be omnipresent, cannot observe each act of all its subcontractors, and has no obligation to do so. Therefore, to impute actual or constructive knowledge to the GC of a serious danger caused by the dereliction of duty by another, the danger must be so apparent that under a reasonable exercise of contractual responsibilities, knowledge of it should have been acquired by the GC. The ***Funk*** Court recognized the GC would not have *any* special or particularized knowledge that the subcontractor or injured worker would not already *themselves* possess. The question is, in effect, whether the GC has *caught* the subcontractor in a serious breach of contract that so endangers workers that a duty to act arises.

The "readily observable" element of the "common work area" doctrine asks if there is sufficient knowledge on the part of the GC that may create a duty running from the GC in favor of a worker who may have been placed in danger by his own employer, or perhaps another subcontractor on site. The knowledge that must be found must be distinctly within

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[1] The danger observed by the GC must also be "avoidable" in the sense that it must be avoidable within the power of the GC, presumably through its authority to stop the work to institute adequate safety devices and procedures in the event the subcontractor fails to do so. As the Plaintiff Ghaffari notes, a construction site is a dangerous place. Each and every danger cannot be considered "avoidable" by the GC merely because the GC observes it. In fact, a fair reading of ***Funk*** must lead to the conclusion that where a subcontractor has met its contractual obligations, and is in full compliance with all state and federal safety regulations, a GC would not be under a duty to intervene, even if it subjectively believed the subcontractor's work could be performed more safely. The ***Funk*** tort duty running from the GC to the individual worker arises only from a breach of the subcontractor's contractual safety obligations, or other "dereliction of duty", by the subcontractor. If the analysis were otherwise, the GC would become a guarantor of worker safety.

the GC's knowledge. The extent of the *worker's* knowledge is not at issue in the "common work area" test.

The other elements of the "common work area" test also recognize the independent nature of the subcontractors, and the elements are designed to measure the extent to which the GC has authority to act and the reasonableness of requiring action. The danger must be located in a common work area, where the problem is "highly visible" ***Funk*** **at 107,** and where the GC's coordinating authority may, if the facts so support, be found to supercede the subcontractors' right to act independently. The danger must be the result of more than just an "occasional lapse" by the subcontractor(s), but must reach a level which presents a "high degree of risk to a significant number of workmen." The ***Funk*** Court noted in that case the "continual nature" of the lack of safety equipment was a distinguishing feature that supported finding a duty. ***Funk*** **at 103, n4.**

The "common work area" test is intended to protect the GC from the imposition of a duty for which it did not contract and cannot meet with reasonable effort. It is significant that Michigan courts have consistently required that all of the elements of the "common work area" test must be met before a duty is found. A plaintiff's failure to satisfy any one of the four elements of the "common work area" doctrine is fatal to a ***Funk*** claim. ***Ormsby at 59***. The "common work area" test determines if a duty exists, and is therefore a question for the Court.

The "Open and Obvious Doctrine"

As an initial proposition, premises liability is grounded on a completely different concept than the "common work area" doctrine:

> "The rationale for imposing liability is that the invitor is in a better position to control the safety aspects of his property when his invitees entrust their own protection to him while entering his property. ***Williams v Cunningham Drug Stores, Inc.*, 429 Mich. 495, 499; 418 N.W.2d 381 (1988).** The invitor's legal duty is "to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land" that the landowner knows or should know the invitees will not discover, realize, or protect themselves against."

***Bertrand v Alan Ford, Inc.*, 449 Mich 606, 609; 537 NW2d 185 (1995).**

Two points are relevant here. First, the difference between the theoretical basis of liability in a premises case and a ***Funk*** case should be distinguished. In a premises case, the possessor knows of a danger that the invitee cannot be expected to discover, and therefore, being in the better position of knowledge, has a duty to act reasonably to protect the invitee. In a ***Funk*** case, the duty does *not* arise because the GC knows of a danger the "invitee" does not know of. Rather, the "invitee" subcontractor is the *first* to be possessed of the knowledge of danger, because it has *caused* the danger by it own breach of its own contractual obligations. The ***Funk*** duty can only arise if the GC discovers the subcontractor's breach under circumstances that meet all the elements of the "common work area" test. If the test is not met, the GC has no duty arising from the negligence of its subcontractors. [2]

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[2] The AGC recognizes that Judge Moody, in his partial dissent in ***Hardy***, expressed concepts that would create a broader common-law duty arising under ***Funk***. The AGC notes that the majority concurred in only the *results* of the relevant parts of Judge Moody's opinion, and the majority did *not* concur in Judge Moody's reasoning. The AGC urges that Judge Moody's reasoning be rejected, since it is inconsistent with previous applications of ***Funk***, and its application would impose strict liability for job site safety upon the GC.

Second, for the reasons stated above, the "common work area" doctrine is not incompatible with the "open and obvious" doctrine, because they are designed to determine different questions. One test determines the existence of a ***Funk*** duty, and one test determines the extent of a duty under a premises theory. Where a Plaintiff seeks to hold the GC liable for the negligence of others, the GC must be found to have a duty under the "common work area" test for the Plaintiff to proceed. Failing a successful showing of GC duty under the "common work area" test, there should be no occasion to conduct an inquiry under a premises liability theory .

However, if all four elements of the ***Funk*** test have been met, then the dangerous condition must have been located in a "common work area" within which the GC was exercising supervisory and coordinating authority. If the plaintiff can establish facts to reach the question of whether the GC had a duty to warn or protect in its role as a possessor of the common work area, then it only makes sense to apply premises law to that inquiry.

Under Michigan law, it is the general rule that "a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." ***Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001)**. This duty does not extend, however, to the removal of dangers which are open and obvious. *Id.* Whether a danger is open and obvious depends upon whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. ***Hughes v PMG Building*, 227 Mich App 1, 10; 574 NW2d 691 (1997)**. "[O]nly those special aspects that give rise to a

uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove [the pothole] from the open and obvious doctrine." ***Lugo, supra*** **at 517-518 (emphasis added).**

Accordingly, the "open and obvious" doctrine can find application in a claim under the "common work area" doctrine, but only as a secondary inquiry, once the four elements of the ***Funk*** test are met. Both doctrines can be appropriate tests in a claim against a GC, but they are *not* the same. The origins of the ***Funk*** doctrine, discussed above, should not be obscured. If premises liability theory were to be merely superimposed upon the existing framework of the "common work area" doctrine, confusion in the law will undoubtedly result. The GC does *not* owe the workers of its subcontractors the same general duties that a land owner owes to invitees, because the GC is not in the same position of a landowner with superior knowledge.

Application of Both Doctrines is Appropriate

The fact that the doctrines are not identical does not preclude sequential application. Absent a showing that a duty has arisen under ***Funk***, there can be no duty at all. Once a duty under the "common work area" doctrine is established, however, the inquiry as to the GC's duty should not be concluded, because if it were, the ***Hardy*** policy of promoting job site safety through comparative negligence principles would be frustrated. Premises liability law incorporates an element that ***Funk*** does not, that being the expectation of *reasonableness on the part of the plaintiff.*

The court determines the circumstances that must exist in order for a defendant's duty to arise, ***Smith v Allendale Mut Ins Co,*** **410 Mich 685, 714-715; 303 NW2d 702**

(1981), but unless there is a method to incorporate the plaintiff's own on-site responsibilities, the court's duty inquiry will focus *only* upon the GC's responsibilities. For claims against GC's, incorporation of the subcontractor/worker responsibility is particularly important, since even in a common work area, the subcontractors have considerable autonomy in performing their work. Further, absent a finding that the GC had superior knowledge, no premises-based duty can arise in the GC.

DISCUSSION OF ISSUE II.

HOW SHOULD THE OPEN AND OBVIOUS DOCTRINE BE RECONCILED WITH *HARDY V MONSANTO-CHEM SYSTEMS, INC.*, 414 MICH. 29; 323 N.W.2D 270 (1992), IN WHICH THIS COURT CONCLUDED THAT THE POLICY OF PROMOTING SAFETY IN THE WORKPLACE WOULD BE ENHANCED BY THE APPLICATION OF PRINCIPLES OF COMPARATIVE NEGLIGENCE?

The ***Hardy*** Court reasoned: "What pure comparative negligence does is hold a person fully responsible for his or her acts and to the full extent to which they cause injury. That is justice. *** Our colleague's approach today would hold these defendants responsible for their acts above and beyond the extent to which they cause injury. That is injustice." ***Hardy*** **at 45** (citing ***Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979)**.

The AGC believes, for the reasons stated above, the "open and obvious" doctrine and the "common work area" doctrine, while not identical, are fully consistent and compatible with each other, and promote "justice" in the manner envisioned by the *Hardy* Court.

Some additional history may be helpful to this discussion. ***Funk*** was based upon and endorsed the public policy of promoting safety in the workplace, which at the time, was far less regulated. ***Funk*** was decided in 1974 when Michigan law followed the doctrine of contributory negligence. In the 30 years since *Funk*, Michigan abandoned the doctrine of contributory negligence, and adopted the doctrine of comparative negligence in 1978. ***See Placek***.

The actual events in ***Funk*** occurred in 1967, see ***Funk v General Motors*, 37 Mich. App. 482, 483; 194 N.W.2d 916 (1972)** and this Court's opinion was issued in 1974,

shortly after passage of the Occupational Health and Safety Act (OSHA) and creation of Occupational Heath and Safety Administration in 1971. Since that time, the industry has made great strides in worker safety. AGC, both at the national and state levels, is very active in worker training and promotion of work place safety. Accordingly, the reasoning as stated in ***Funk*** contains certain outdated assumptions. In order to cover their necessary costs, subcontractors must include within their bids money allocated to meet their regulatory and contractual safety obligations. The economic reality and distribution of safety responsibilities on the construction site has changed since 1967. The subcontractor is no longer in a position where it must "rely" on the GC to provide basic safety equipment, as the ***Funk*** Court assumed.

Consider the 21st Century construction environment in light of this Court's reasoning in ***Hardy***: "at some point a worker must be charged with *some* responsibility for his own safety-related behavior. If a worker continues to work under extremely unsafe conditions when a reasonable worker under all the facts and circumstance would 'take a walk', the trier of fact might appropriately reduce the plaintiff's recovery under comparative negligence." ***Hardy at 41*** (emphasis in original). And "The comparative negligence rule also enhances safety in the workplace by rewarding safety-conscious contractors.

* * * The irrebuttable presumption that all contractors force workers to work under hazardous conditions might well become a grim self-fulfilling prophecy if we refuse to encourage safety-conscious contractors under the doctrine of comparative negligence." ***Hardy at 41-42.***

Hardy also says: "As discussed above, the application of comparative negligence to *all* workplace negligence satisfies the ***Funk*** policies as well as encourages safer behavior by both contractors and workers. We prefer a unitary approach [fn omitted] under which both the plaintiff and defendant are charged with the duty to act reasonably under all the circumstances." ***Hardy at 47*** (emphasis in original).

The "open and obvious doctrine" is the other half of the duty inquiry for cases seeking recovery against GC's. Where the "common work area" doctrine looks at the general contractor's duty only, the "open and obvious" doctrine analyzes the worker's safety responsibilities as well. The unitary approach articulated by the ***Hardy*** court cannot be applied without viewing duty "in the round," and not from the GC's perspective alone.

The "open and obvious" doctrine incorporates an expectation of reasonableness on the part of the plaintiff, which is fully necessary to follow the Court's mandate in ***Hardy***. There is no danger that applying the standards of the "open and obvious" doctrine to the question of duty will re-introduce a de-facto contributory negligence barrier into the equation. Rather, without "open and obvious" standards, GC's may be held "responsible for their acts above and beyond the extent to which they cause injury." As the ***Hardy*** Court rightly noted, "That is injustice."

REQUEST FOR RELIEF

The Associated General Contractors of Greater Detroit and the Michigan Chapter of The Associated General Contractors of America (Collectively, AGC), hereby respectfully request that this honorable Supreme Court affirm the lower court rulings and grant dismissal as requested by defendants-appellants.

THOMAS M. KERANEN & ASSOCIATES, P.C.

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Dated: April 11, 2005